LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 1 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD
AND
C. LEE BUXTON,
Appellants,
vs.
STATE OF CONNECTICUT
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

MOTION TO DISMISS APPEAL

JOSEPH B. CLARK,
Ass't Prosecuting Attorney,
6th Circuit Court,
171 Church Street,
New Haven, Connecticut,
Attorney for Appellee.

PHILIP F. MANCINI, JR.,
Prosecuting Attorney,
6th Circuit Court,
171 Church Street,
New Haven, Connecticut,
Of Counsel

THE HARTY PRESS, INC., NEW HAVEN, CONN.

SUBJECT INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

vs.

STATE OF CONNECTICUT

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss on the grounds that the questions presented do not present a substantial federal question, that the judgment rests on an adequate non-federal basis, and that some of the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on.

OPINIONS BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered May 12, 1964, is reported in 25 Conn. L.J. #47, p. 5, 200 A. 2d 479 and is printed in the Appendix to the Jurisdictional Statement filed by the appellants, p. 21.

The opinion of the Appellate Division of the Circuit Court of Connecticut rendered January 7, 1963 is reported in 3 Conn. Cir. 6. It will also be found in A-427 Conn. Sup. Ct. Rec. & Briefs, 577 and is set forth in the Appendix to this statement.

JURISDICTION

On November 10, 1961 a warrant was issued charging that the appellant C. Lee Buxton, a duly qualified and licensed physician and appellant Estelle T. Griswold "in violation of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception." The appellants were arrested on the same date and on November 24, 1961 the appellants demurred to the informations on the grounds that as the cited statutes would be applied to the appellants they would be unconstitutional in that they would deny the appellants' rights to liberty and property without due process of law in violation of the 14th Amendment to the Constitution of the United States and that they would deny them their rights to freedom of speech and communication of ideas under the 1st and 14th Amendments to the Constitution of the United States.

The demurrers were overruled. On January 2, 1962, the appellants, after trial to the Court, were found guilty and sentenced to pay a fine of $100 each.

On January 10, 1962 after stipulation of the parties the Court entered an order for joint appeals.

Appellants filed an assignment of errors and an appeal was taken to the Appellate Division of the Circuit Court which affirmed the judgment of the Circuit Court, 6th Circuit in an opinion rendered January 7, 1963.

The Appellate Division certified two questions to the Supreme Court of Errors of Connecticut.

On January 31, 1963 appellants petitioned for certification of additional question which was granted on February 19, 1963. On April 28, 1964, the Supreme Court of Errors affirmed the judgment of the Circuit Court. Execution was ordered stayed on May 20, 1964 and on July 22, 1964 a motion of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut.

QUESTIONS PRESENTED BY THE APPELLANTS IN THEIR JURISDICTIONAL STATEMENT.

1. Whether Section 53-32 and 54-196 deprive these appellants of their liberty and property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

(a) As to the appellant Estelle T. Griswold. This issue should be dismissed as the issue was not expressly passed on (Rule 16b) since although she claimed this question in her demurrer and on her assignments of error, she did not brief the point in her brief before the Supreme Court of Errors of Connecticut. The Connecticut practice is: "The claims of error not briefed are considered to have been abondoned." *Leo Foundation* v. *Cabelus*, ...Conn....., 201 A. 2d 654, 655 (1964).

(b) As to the appellant Estelle T. Griswold and the appellant C. Lee Buxton. Jurisdiction of the Supreme Court has been claimed on the basis of 28 U.S.C. Section 1257(2). Yet the appellants never argued, either in their demurrers nor did they claim as error in their assignments of errors that the statute itself

was repugnant to the United States Constitution. What the appellants did claim was that the statutes in question as they would be applied to them was a denial of their rights under the Constitution of the United States. In other words, they have argued that their federal rights prevented the application of these state statutes to them. The decisions of the Connecticut Courts adverse to this claim amounts to a denial of their assertion of federal rights rather than a validation of the state statutes and review can be had in the Supreme Court only via certiorari under 28 U.S.C. 1257 (3). *Mergenthaler Linotype Co.* v. *Davis,* 251 U.S. 256, 259 (1919).

2. Whether Section 53-32 in connection with Section 54-196 of the General Statutes of Connecticut deprives appellants' patients of their liberty without due process of law contrary to the 14th Amendment to the Constiution of the United States.

This issue should be dismissed as the question was not timely raised or expressly passed on (Rules 16b) in that this is the first time that the appellants are raising rights of others. The appellants in their claims of error below and in their brief before the Supreme Court of Errors of Connectiuct, it is supposed, to avoid the ruling of *Tileston* v. *Ullman,* 318 U.S. 44, 46, 87 L. Ed. 603, 604, (1942) that a physician could not litigate the rights of patients not parties to the action, put great emphasis on the proposition even to the point of putting it in italics that the issue was "a denial of defendants' " rights and not that of the patients. Brief of Defendants — Appellants (page 59) A-427 Connecticut Records and Briefs, 615. Also the appellants in their Jurisdictional statement, p. 12, state that they are asserting rights personal to them. Manifestly since this has been the issue argued by them and considered

by the courts, they cannot now be permitted to change their grounds of appeal.

3. Whether Section 53-32 and Section 54-196, Connecticut General Statutes, as applied in this case to the appellants deprive them of their freedom of speech. Jurisdiction of the Supreme Court has been claimed on the basis of 28 U.S.C. Section 1257 (2). Yet the appellants never argued, either in their demurrers nor did they claim as error in their assignments of error that the statutes themselves were repugnant to the United States Constitution. What the appellants did claim was that the statutes in question as they would be applied to them were a denial of their rights under the Constitution of the United States.

In other words, they have argued that their federal rights prevented the application of these state statutes to them. The decisions of the Connecticut Courts adverse to this claim amounts to a denial of their assertion of federal rights rather than a validation of the state statutes and review can be had in the Supreme Court only via certiorari under 28 U.S.C. 1257 (3). *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259 (1919).

4. Whether Section 53-32 is unconstitutional on its face and as applied to married patients of these appellants and other married couples because it is an unjustifiable invasion of their privacy contrary to the Fourth, Ninth and Fourteenth Amendments of the Constitution of the United States.

This question should be dismissed as the question was not timely or properly raised or passed on (Rule 16b) in that this is the first time that this issue has entered the case. Only the constitutional issues raised in lower courts are before the Supreme Court on appeal. *Kelley v. Kraemer, Mich. & Mo*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 441 (1948).

One who has raised but one federal question cannot argue another unconnected question not raised in any of the courts below and not necessarily arising on the record, though it discloses facts on which it might have been raised. *Dewey* v. *City of Des Moines*, 173 U.S. 193, 19 S. Ct. 379, 43 L. Ed 665 (1899).

QUESTIONS PRESENTED

Where the appellants served as director (Estelle T. Griswold) and medical director (C. Lee Buxton) of a center to which married women came to obtain contraceptives and instructions as to their use to prevent pregnancy and where such married women received such contraceptive articles and instructions (in some cases from the appellants themselves) did Section 53-32, General Statutes of Connecticut, Revision of 1958 in connection with Section 54-196 of said statutes: 1) deny the appellant C. Lee Buxton his rights to liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States? 2) deny these appellants their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States?

STATUTES INVOLVED

The pertinent state statutes are set forth in the Jurisdictional Statement at page 4.

STATEMENT OF THE CASE

In November, 1961, the Planned Parenthood League of Connecticut occupied offices at 79 Trumbull Street in New Haven, Connecticut. For ten days during that month the league operated a planned parenthood center in the same building. The appellant Estelle T. Griswold is the salaried executive director of the league and served as acting director of the

center. The other appellant, C. Lee Buxton, a physician, who has specialized in the fields of gynecology and obstetrics, was the medical director of the center. The purpose of the center was to educate persons generally as to the means and methods of preventing conception. In addition patients were furnished with various contraceptive devices, drugs, or materials. A fee was collected from the patient. At the trial three married women from New Haven testified that they had visited the center, paid a fee, received certain contraceptive devices and materials and instructions and advice as to their use, and used these devices and materials as contraceptives in subsequent marital relations with their husbands.

ARGUMENT

POINT I

The Decision Below Was Based Upon The Evidence

There is no dispute about the facts of the case. At the trial, three married women from New Haven testified that they had visited the planned parenthood center of which the appellant Estelle T. Griswold was director and the appellant C. Lee Buxton was medical director, had received advice, instruction and certain contraceptive devices and materials from either or both of the appellants, paid a fee, and used these devices and materials as contraceptives in subsequent marital relations with their husbands. Upon these facts, and with the testimony of the appellants to the same effect, there is no doubt that, within the meaning of Section 54-196 of the General Statutes of Connecticut, the appellants did abet and council married women in commission of an offense under Section 53-32 of the General Statutes of the State of Connecticut.

The law of accessories is well settled in Connecticut.

"Everyone is a party to an offense who either actually

> commits the offense, or assists in the actual commission of the offense or of any act which forms a part thereof, or directly or indirectly counsels or procures any person to commit the offense or do any act forming a part thereof. Counseling or procuring the commission of the offense includes . . . the procuring of implements or other means which may have served in its commission, with intent that they shall so serve; and assisting knowingly and wilfully, the perpetration of the offense in those acts which have prepared for, facilitated, or consummated the offense.

State v. *Scott*, 80 Conn. 317, 323-324 (1907). The above is still the rule in Connecticut. *State* v. *Pundy*, 147 Conn. 7, 12, 156 A. 2d. 193, 195 (1959).

POINT II

There Is No Conflict of Decision

> Of the few jurisdictions that have ruled on the constitutionality of contraceptive statutes all seem to be in agreement with the Connecticut Court that regulation of contraceptives is a legitimate exercise of the state's police power to regulate public morals.

34 Connecticut Bar Journal 315 (September, 1960). See *Commonwealth* v. *Allison*, 227 Mass. 57, 116 N. E. 265 (1917); *Commonwealth* v. *Gardner*, 300 Mass. 372, 15 N. E. 2d 222 (1938); *People* v. *Pennock*, 294 Mich. 587, 293 N. W. 759 (1940); *People* v. *Sanger*, 222 N. Y. 192, 118 N. E. 637 (1918); *State* v. *Arnold*, 217 Wisc. 340, 258 N. W. 843 (1935); *State* v. *Kohn*, 42 N. J. Super 578, 127 A. 2d 451 (1956); *Cavalier Vending Corp.* v. *State Bd. of Pharmacy*, 195 Va. 626, 79 S. E. 2d 636 (1954) appeal denied, 347 U. S. 995, 74 S. Ct. 871, 98 L. Ed. 1127 (1954); *Lanteen Laboratories, Inc.* v. *Clark*, 294 Ill. App. 81, 13 N. E. 2d 678

(1938). Also see 1 C. J. S. — *Abortion*, Section 44, page 341; 113 A.L.R. 970 and 12 Am. Jr. 2d — *Birth Control*, Section 4, page 370.

POINT III

There Is No Important Question of Federal Law

The present action presents the same fact situation as was before this Court in the case of *Commonwealth* v. *Gardner*, 300 Mass. 372, 15 N.E. 2d 222 (1938). In that case a physician and other officials of the North Shore Mothers' Health Office — a clinic where contraceptives were sold or given to patients after examination by a physician — were arrested and convicted of violating a Massachusetts statute which prevented the sale or gift of contraceptives. It is the contention of the appellee, the State of Connecticut, that the two Connecticut Statutes, 53-32, using a drug or instrument to prevent conception, and 54-196, assisting, abetting, counseling another to commit an offense, when taken together would bar the sale or gift of a device used for the purpose of preventing conception, thus bringing the case at bar directly under the rule established by the Court in the *Gardner* case, supra.

This Court dismissed the appeal from the Massachusetts Court for want of a substantial federal question. *Gardner* v. *Commonwealth*, 305 U. S. 559, 59 S. Ct. 90, 83 L. Ed. 353 (1938). It is submitted that the same should be done in the instant case.

It is argued by the appellant Buxton that his right to practice medicine is impaired. The state denies this. The appellee is of the opinion that the practice of medicine is directed to the treatment, cure, and prevention of disease. Nowhere in either the testimony, findings or claims of error is there any claim that the women who testified in this case were in other than

perfect health. The fact situation in this case is not the same as that involved in *Poe* v. *Ullman*, 367 U. S. 497, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961). The issue here is the one which was referred to by Harlan, J. in *Poe* v. *Ullman*, supra, in a dissenting opinion: "If we had a case before us which required us to decide simply, and in the abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views (on the morality of the use of contraceptives)" *Poe* v. *Ullman*, 367 U. S. 497, 547, 6 L. Ed. 2d 989, 1021 - 1022, 81 S. Ct. 1752, 1779 (1961).

"Besides, there is no right to practice medicine which is not subordinate to the police power of the States." *Lambert* v. *Yellowley*, 272 U. S. 581, 596, 71 L. Ed. 422, 47 S. Ct. 210, 49 A.L.R. 575,, 583 (1926).

The appellants' claim of freedom of speech is without merit. It was not the speech of the appellants that caused their conviction. It was their actions. When they furnished contraceptive materials to women to be used as contraceptives and instructed the women as to their use to prevent pregnancy, then the appellants have, under Connecticut law, committed a crime and have no more right to justify their conduct as being protected by the constitutional freedom of speech than a man yelling fire in a crowded theater, or a person placing a wager.

As the Court below said: "The record is bare of any showing that the law imposes any restraints on the protected liberties and the guaranteed rights of the defendants; and the merely notional, metaphysical or moral constraints, to which its preventive force is directed, are not such as to fall within constitutional pro-

hibitions." *State of Connecticut* v. *Griswold and Buxton*, 3 Conn. Cir. 6, 10. (This opinion is printed in the Appendix to this motion)

The arguments of the appellants in essence attack the desirability of this statute. It has been held that the Supreme Court may not decide the desirability of legislation in determining its constitutionality; the forum for correction of ill-considered legislation being a responsive legislature. *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U. S. 220, 69 S. Ct. 550 (1949).

Connecticut has statutes restricting sexual relations to the married with their spouses (Gen. Stat. Conn., Rev. 1958, Section 53-218 Adultery and Section 53-219 Fornication). Certainly the Connecticut General Assembly could have written an exception into Section 53-32. Since it did not, we must conclude that such an exception would endanger the effectiveness of the statute. *Commonwealth* v. *Gardner*, supra, p. 375.

The appellants in their Petition p. 18 state that contraceptive devices may be obtained in Connecticut. There is no foundation in the record for this statement. In fact, the opposite is true. In their assignment of errors to both the Appellate Division of the Circuit Court (A - 427 Conn. Sup. Court Rec. & Briefs 576) and to the Supreme Court of Errors of Connecticut (A - 427 Conn. Sup. Court Rec. & Briefs 583) the appellants cited as error the sustaining of objections made by the State-appellee to a question posed on cross-examination: "Now in the course of your investigation, Detective Berg, did you ascertain whether these products were available anywhere else in the City of New Haven?" This is the only place in the records where availability of contraceptives is mentioned. The appellants have not claimed this ruling on evidence in their Notice of Appeal to this Court nor in Questions to be reviewed in their Jurisdictional Statement. Manifestly they cannot make that claim now.

The appellee submits that these appellants who were in the business of running a contraceptive dispensary to which women came, paid a fee, were given devices and instructions as to their use to prevent conception, and subsequently used these devices to prevent conception have been properly convicted of aiding and abetting the use of contraceptives.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal be dismissed and that certiorari be denied.

Respectfully submitted,

JOSEPH B. CLARK
Counsel for Appellee

171 Church Street
New Haven, Connecticut
September 30th, 1964

CERTIFICATE OF SERVICE

I, Joseph B. Clark, counsel for appellee, and a member of the bar of the Supreme Court of the United States do hereby certify that on the thirtieth day of September, 1964, I served a copy of the foregoing Motion to Dismiss upon the appellants by mailing five copies thereof, postage prepaid to Fowler V. Harper, Esq., 127 Wall Street, New Haven Connecticut.

JOSEPH B. CLARK
Counsel for Appellee

APPENDIX

Appellate Division of the Circuit Court

ARGUED OCTOBER 19, 1962

STATE OF CONNECTICUT v. ESTELLE T. GRISWOLD

File No. CR 6-5653 AP

STATE OF CONNECTICUT v. C. LEE BUXTON

File No. CR 6-5654 AP

Date of Judgment January 7, 1963

Decision Announced January 17, 1963

Informations charging the defendants with the crime of assisting and abetting the use of drugs, medicinal articles and instruments for the purpose of preventing conception; brought to the Circuit Court in the sixth circuit and tried to the court, *Lacey, J.*; judgment of guilty in each case and appeal by the defendants. *No error; certified to the Supreme Court of Errors.*

Catherine C. Roraback, for the appellants, (defendants).

Julius Maretz, prosecuting attorney, and *Joseph B. Clark*, assistant prosecuting attorney, for the appellee (for the appellee (State).

KOSICKI, J. Both of these cases were tried together and, by stipulation, the appeals from the judgments rendered have been combined. The informations contained identical allegations charging each defendant with a violation of §§ 53-32 and 54-196 of the General Statutes in that each defendant "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception . . . and that thereafter said married women in consequence of said conduct [of the defendant] did in fact use said drugs, medicinal articles, and instruments for

the purpose of preventing conception."[1] In each case a demurrer was filed on the ground that the quoted sections of the General Statutes were unconstitutional as here applied because (1) they denied the defendants their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and (2) they denied them their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and §§ 5 and 6 of Article First of the Constitution of Connecticut. Both demurrers were overruled and error is assigned in the ruling of the court.

The court found the following facts. The Planned Parenthood Center of New Haven, referred to herein as Center, was opened on November 1, 1961 to provide information, instruction and medical advice to married persons as to means and methods of preventing conception and to educate persons generally as to such means and methods. The Center was located in eight rooms on the second floor of a building at 79 Trumbull Street in New Haven, which consisted of a reception room, waiting room, interview room, consultation room, examining room, two dressing rooms and a laboratory. The Center operated from November 1 to November 10, when it was closed following the arrest of the defendants. The Planned Parenthood League occupied an office consisting of four rooms on the second floor of the same building. The defendant Estelle T. Griswold held the salaried office of executive director of the League. She was also the acting director of the Center and in charge of administration and the educational program.

The defendant C. Lee Buxton is a physician, licensed to practice in the state of Connecticut, who is a specialist in the field of obstetrics and gynecology, the director of the University Obstetrical and Gynecological Service at the Grace-New Haven

Community Hospital in New Haven, Connecticut, the chairman of the Department of Obstetrics and Gynecology and Professor of Obstetrics and Gynecology at the Yale University Medical School in New Haven, an author in the field of his specialty and a leader in its professional organizations. He was the medical director of the Center, both before its opening and while it was in operation from November 1 to November 10, 1961. As such medical director and after consultation with the Medical Advisory Committee of the Center, which committee was appointed by him, Doctor Buxton made all medical decisions as to the facilities of the Center, the arrangement of its rooms, the equipment purchased for it, the medical forms, patients' history forms and other forms used there, the procedures followed in processing the patients at the Center, the types of contraceptive advice available and provided at the Center, the types of contraceptive articles and materials available at the Center for distribution to patients, the methods of providing the same, and the selection, assignment and supervision of the medical doctors to staff the Center. In addition, Dr. Buxton on several occasions, as a physician, examined and gave contraceptive advice to patients at the Center while it was in operation from November 1 to November 10, 1961.

The general procedure for the processing of a patient of the Center was as follows: Individuals called the Center by telephone or came in making inquiry, and were briefly questioned to ascertain whether they were in fact seeking contraceptive advice and, if so, they were given an appointment for a stated day and hour. The patient, having come to the Center at the appointed time, was first interviewed by a staff member who took a case history of the patient on a standard form on which were entered the patient's name,her husband's name, ages of both, employment, family income, other economic information, the patient's pregnancy history, methods of contraception pre-

viously used, the reason for desiring a change of method, and the pertinent medical history of the patient, her husband and children. After this the patient attended a group orientation session with other patients at which all of the methods of contraception available at the Center were described, at the conclusion of which lecture the patient selected the method which she desired to use and as to which she wished to obtain further information and advice.

Thereafter each patient individually saw a staff doctor who gave her a pelvic examination, reviewed the method of contraception selected by the patient in the light of this examination and of her medical history, and prescribed to the patient the method selected by her unless it was contraindicated. The doctor or nurse then gave the patient advice as to how to use the method of contraception prescribed, and advised her when to return to the Center for further consultation and advice.

The patient was then furnished with the contraceptive device, drug or contraceptive material prescribed by the doctor, made an appointment for a return visit, was charged a fee for the visit and left. The fees charged to the patients were on a sliding scale ranging from nothing to a maximum of $15.00 and the exact fee charged any one patient was determined on the basis of family income. In the waiting room and available to patients were various pamphlets some of which contained information, instruction and advice on the various methods of contraception available.

Joan B. Forsberg, a housewife and mother of three children living with her family in New Haven, upon learning of the existence of the Center, arranged for an appointment at the Center which was made for November 8, 1961 and on that date she went to the Center as a patient, seeking contraceptive advice,

where she had her case history taken by a receptionist, attended an orientation session at which the defendant Estelle T. Griswold instructed her and other women as to the various methods of contraception available at the Center and told the patients they could choose the method they would individually prefer and be furnished with the necessary materials if the doctor approved, was given a pelvic examination by a staff doctor, was told by the staff doctor that the anti-ovulation pill method of contraception which she had chosen was all right for her to use, was instructed by the doctor in its use, was thereafter given a supply of sixty anti-ovulation pills by the person on duty at the registration desk at the direction of the defendant Estelle T. Griswold, and before leaving paid a fee to the Center and was told to return to the Center in two months. After her visit to the Center, Mrs. Forsberg used approximately thirty of the pills furnished to her at the Center for the purpose of preventing conception.

On November 7, 1961, one Marie Wilson Tindall, a housewife and mother of several children living with her family in New Haven, after having made an appointment beforehand, went to the Center with her husband in order to obtain information concerning contraception. She had her case history taken by the receptionist, attended an orientation session with other patients at which were described the various types of contraceptives available at the Center, was given a pelvic examination by a staff doctor, told the doctor that she had chosen a diaphragm as the type of contraceptive she wished to use, was fitted and given by doctor a diaphragm and accompanying articles and thereafter was instructed by one of the personnel in how to use them, and before leaving paid a fee of $7.50 to the Center. After her visit to the Center, Mrs. Tindall used the diaphragm and other articles furnished to her at the Center for the purpose of preventing conception.

On November 9, 1961, one Rosemary Anne Stevens, a young student married nearly a year and living with her husband in New Haven, having made an appointment, went to the Center seeking to obtain contraceptive advice additional to that previously obtained by her in England. While at the Center she had her case history taken by the defendant Estelle T. Griswold, attended an orientation session at which the defendant Estelle T. Griswold described the methods of contraception available at the Center, was given a pelvic examination by the defendant Dr. C. Lee Buxton acting as a staff doctor on that day at the Center, was advised by him that the method of contraception which she had been using and had chosen was satisfactory for her, was given instruction by him as to its use, and, before leaving the Center was given a tube of contraceptive jelly by the defendant Estelle T. Griswold and paid a fee of $15.00 to the Center. After her visit to the Center, the said Mrs. Stevens used this jelly for the purpose of preventing conception.

The defendant C. Lee Buxton served as medical director of the Center and furnished, at the Center, medical advice to married women as to the use of drugs, contraceptive articles and materials and instruments for the purpose of preventing conception because in his judgment, based on the overwhelming opinion of medical experts in this country, this type of advice is an aspect of medical care which it is the responsibility of every doctor to furnish when in his opinion the patient should have it, and he therefore felt justified as a medical doctor in giving such advice and instruction.

It is the opinion of doctors who practice and specialize in the practice of obstetrics and gynecology in the city of New Haven and in the state of Connecticut, that it is accepted medical practice for a physician to advise a woman suffering from a serious medical condition such as hypertensive cardiovascular heart disease that pregnancy would be detrimental to her health

and that she should avoid such pregnancy. Mrs. Griswold served as administrative director of the Center and participated in its operation because she felt that medically prescribed methods of contraception should be made available to the married women of Connecticut in order that they might protect their health as mothers, the emotional and economic stability of their families and promote responsible parenthood.

The issues of constitutionality of § 53-32, raised by demurrer, and urged in the trial and on appeal are fundamentally not new. The statute had been declared as not violative of the Fourteenth Amendment by our Supreme Court of Errors in a number of cases presenting a variety of factual situations, including those described in the foregoing recital. In those cases were involved alleged violations of the same constitutional rights that are the subject of main concern in this appeal. *Buxton* v. *Ullman* (and companion cases), 147 Conn. 48, 156 A. 2d 508, 367 U.S. 497, 6 L. Ed. 2d 989, (appeals dismissed for absence of justiciable controversy); *Trubek* v. *Ullman*, 147 Conn. 633, 165 A. 2d 158, 367 U.S. 907, 6 L. Ed. 2d 1249, (appeal dismissed, certiorari denied); *Tileston* v. *Ullman*, 129 Conn. 84, 26 A. 2d 582; 318 U.S. 44, 87 L. Ed. 603, (appeal dismissed "no standing"); *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856. It has been repeatedly stated that § 53-32 is a valid exercise of the police power of the state; that no exceptions could be injected into the statute to allow physicians to advice and prescribe the use of contraceptive devices for use by married women; that such use was not permissible even in situations where, in the opinion of a competent physician the "general" health and well-being of the patient required it or pregnancy posed a real and immediate threat to the life and health of the patient. See *Buxton* v. *Ullman*, supra, 51-54, 55, and cases cited; *Trubek* v. *Ullman*, supra, 655.

The chief contention of the defendants, relating to their con-

viction as accessories, is that (1) § 53-32 could not be applied constitutionally to penalize the actions of the three married women, as described above; therefore, (2) there were no substantive offenses committed by them to which the defendants could have been accessories. It is unquestionably the law that an offense must have been committed before a person can be charged as accessory to its commission, *State* v. *Wakefield*, 88 Conn. 164, 175. That does not mean that the principal offender must have been first convicted or even prosecuted. The test is whether one charged as an accessory shared in the unlawful purpose and knowingly and wilfully assisted the perpetrator in the acts which prepared for, facilitated or consummated the offense. *State v. Pundy*, 147 Conn. 7, 11.

Much of the defendants' brief dealing with the commission of the substative offense, is directed toward an attack on the constitutionality of the statute because of its invasion of the freedom of conjugal felicity which married couples, by the natural order of society, are entitled to enjoy. It is stated that enforcement of the statute would result in an invasion of privacy, a violation of the sanctities of the home and a gross intrusion into the most sacred area of life. These rights and freedoms are protected both by our federal and state constitutions and there is no suggestion in the record or in the evidence that they have been invaded. They are the rights guaranteed to the married persons involved and not the rights of these defendants. *Tileston* v. *Ullman*, 318 U.S. 44, 46, 87 L. Ed. 603, 604.

The necessary proof of the offense was supplied by the voluntary testimony of the three married women. This evidence was not coerced nor was it illegally or surreptitiously obtained. It was also found indisputably that the defendants performed the various acts described above in assisting, abetting and counselling the use of contraceptives by each of these women and that

the contraceptive devices and materials were so used. That was the acknowledged purpose of the clinic in the operation of which the defendants admittedly participated. There was no error in overruling the demurrers and the conclusion of the court that the defendants were guilty under the cited statutes must stand.

The next main contention of deprivation of constitutional rights relates to the claim of the defendant Dr. Buxton that in giving advice he did he was conscientiously discharging his duties as a competent physician and a recognized authority in the field of obstetrics and gynecology; and depriving him of this right is a denial of his constitutional guarantee to freedom of speech in violation of the First and Fourteenth amendments to the Constitution of the United States and Article First, §§ 5 and 6, of the Constitution of Connecticut. This claim had not been expressly asserted in the earlier cases cited above; we are not warranted in concluding, however, that this omission was due to oversight on the part of court and counsel or a knowing fragmentation of constitutional issues to be reserved for later presentation. The rule in *Buxton* v. *Ullman*, 147 Conn. 48, 51-55, appears to be inclusive of the claim now being separately presented as a curtailment of freedom of speech, that is particularly so because there can be no practical separation of facts to divide the acts of prescribing and furnishing the contraceptive materials and the words and speech accompanying such acts. Both were part of the practice of medicine which, to the extent inhibited by the statute in question, must yield to the police power of the state. *State* v. *Nelson*, 126 Conn. 412, 422.

In view of the decisions of our Supreme Court of Errors, which we must consider as controlling, we regard the remaining arguments addressed to the alleged unconstitutional aspects of § 53-32, as a recapitulation of what our courts have already considered and what, without exception, has been declared to

be matter for legislative rather than judicial consideration. Our examination of the records and briefs in the former cases confirms our belief that not only the same or nearly identical claims of law but also substantially similar comments and opinions, liberally quoted from medical and religious sources, had been urged upon our courts and the answer has been the same. See *State* v. *Nelson*, supra, Conn. Supreme Court Rec. & Briefs, A - 144; *Tileston* v. *Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 172; *Buxton* v. *Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 380; *Trubek* v. *Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 391.

Every general law, in its ultimate objective, is declaratory of public policy. The wisdom or unwisdom of legislation is not subject to judicial examination unless it so interferes with rights of individuals as to require judicial intervention for their protection. The possibility or present predictability of failure in the legitimate aims of a legislative enactment, or even a previsive estimate of futility in the attempt, does not pose a question for judicial determination. *State* v. *McKee*, 73 Conn. 18, 30. A law, to be held unconstitutional, must be plainly violative of some constitutional mandate and admit of no other reasonable construction. "Whatever may be our own opinion regarding the general subject, it is not for us to say that the legislature might not reasonably hold that the artificial limitation of even ligitimate child-bearing would be inimical to the public welfare and, as well, that the use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals . . . *State* v. *Nelson*, supra, 424.

It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race and to avert those perils of extinction of which states and nations have been alertly aware since

the beginning of recorded history. Each civilized society has a primordial right to its continued existence and to the discouragement of practices that tend to negate its survival.

The record is bare of any showing that the law imposes any restraints on the protected liberties and the guaranteed rights of the defendants; and the merely notional, metaphysical or moral constraints, to which its preventive force is directed, are not such as to fall within constitutional prohibitions

The remaining assignments of error are directed toward rulings excluding certain proferred evidence and the denial of one paragraph of the motion to correct the finding. What has been said above and the decisions referred to herein support the correctness of the court's rulings.

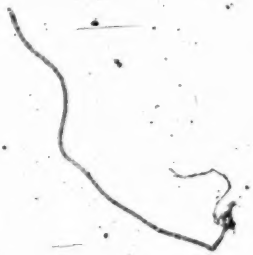
The questions involved are deemed to be of great public importance and it is found that there are substantial questions of law which should be reviewed by the Supreme Court of Errors, namely:

1. Have the defendants been denied their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States?

2. Have the defendants been denied their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and Sections 5 and 6 of Article first of the Constitution of Connecticut?

There is no error; the case is certified to the Supreme Court of Errors.

In this opinion PRUYN and DEARINGTON, Js. concurred.



Footnote

[1] "Sec. 53-32. USE OF DRUGS OR INSTRUMENTS TO PREVENT CONCEPTION. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

[2] "Sec. 54-196. ACCESSORIES. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."